Cola Electric Company, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 673. Cases 8–CA–35199-1 and 8–CA–35287–1

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon a charge filed by the Union on August 2, 2004, the General Counsel issued the order consolidating cases, consolidated complaint, and notice of hearing on October 28, 2004, against Cola Electric Company, Inc. (the Respondent) alleging that it has violated Section 8(a)(1) and (3) of the Act. On November 10, 2004, the Respondent filed an answer to the consolidated complaint. By letter dated July 1, 2005, counsel for the Respondent withdrew the answer.

On July 18, 2005, the Acting General Counsel filed a Motion for Default Judgment with the Board. On July 21, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively stated that unless an answer was filed by November 12, 2004, all the allegations in the consolidated complaint could be considered admitted.

Here, according to the uncontroverted allegations in the Motion for Default Judgment, although the Respondent initially filed an answer on November 10, 2004, the Respondent, by counsel, subsequently withdrew that answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the consolidated complaint must be considered to be true.[1]

Accordingly, based on the withdrawal of the Respondent's answer to the consolidated complaint, and in the absence of good cause being shown otherwise, we grant the Acting General Counsel's Motion for Default Judgment insofar as the consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act in certain respects, and violated Section 8(a)(3) of the Act by discharging an employee and by refusing to consider for hire or hire eight employee applicants because they joined and assisted the Union and engaged in concerted activities.

With respect to the alleged refusal-to-hire or consider-for-hire violations, we find that the undisputed consolidated complaint allegations are sufficient to establish these violations under the standards set forth in *FES*, 331 NLRB 9 (2000), supp. decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). See *Jet Electric Co.*, 334 NLRB 1059 (2001), supp. decision 338 NLRB 650 (2002). Under the *FES* standards, however, the consolidated complaint allegations are insufficient to enable us to determine the appropriate remedy for these violations. In this regard, the Board held in *FES* that in cases involving more than one applicant, the General Counsel, in order to justify an affirmative remedy of instatement and backpay, must show at the unfair labor practice stage of the proceeding the number of openings that were available. 331 NLRB at 14. See also *Jet Electric Co.*, supra.

Here, the consolidated complaint fails to allege how many openings were available for the discriminatee applicants. We shall therefore hold in abeyance a final determination of the appropriate affirmative remedy for the Respondent's refusal-to-hire or consider-for-hire violations,[2] pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the discriminatees.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation, with an office and place of business in Mentor, Ohio (the Respondent's facility), has been engaged in the construction industry as an electrical contractor.

Annually, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 within the State of Ohio for Cleveland

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

[2] The Board does not provide the standard *FES* remedy for a refusal-to-consider for hire violation where a more comprehensive instatement and backpay remedy for a refusal-to-hire violation is appropriate. This is because the limited remedy for a refusal-to-consider violation is subsumed within the broader remedy for the refusal-to-hire violation. Accordingly, whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted in this case will depend on whether the evidence shows that enough openings were available to justify the more comprehensive remedy of instatement and backpay for the refusal-to-hire violations. See *Jet Electric Co.*, supra at fn. 2.

[3] A hearing will not be required if, in the event that the General Counsel amends the consolidated complaint, the Respondent fails to answer, thereby admitting facts that would permit the Board to resolve the remedial instatement and backpay issue. In those circumstances, the General Counsel may renew the Motion for Default Judgment with respect to this specific affirmative remedy. See *Jet Electric Co.*, id.

Construction, which is an enterprise engaged in commerce on a direct basis.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Electrical Workers, Local Union No. 673, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Richard Cola—President

Ronald Cola—Vice President

Sometime about mid-May 2004, the exact date being unknown, the Respondent, by its supervisor and agent, Richard Cola, by telephone, unlawfully informed a job applicant that the Respondent could not hire him because he was a union member.

About May 18, 2004, the Respondent, by its supervisor and agent, Richard Cola, by telephone, unlawfully interrogated a job applicant as to whether he was a union member and coercively informed him that he could not hire union members.

About May 21, 2004, the Respondent, by its supervisor and agent, Richard Cola, by telephone, unlawfully interrogated a job applicant as to whether he was a union member.

About June 4, 2004, the Respondent, by its supervisor and agent, Richard Cola or Ronald Cola, at a Sam's Club worksite in Mentor, Ohio, unlawfully interrogated a job applicant as to whether he was a union member.

About June 10, 2004, the Respondent, by its supervisor and agent, Richard Cola, at a Sam's Club worksite in Mentor, Ohio, unlawfully interrogated a job applicant as to whether he was a union member.

About June 16, 2004, the Respondent, by its supervisor and agent Richard Cola, at a Sam's Club worksite in Mentor, Ohio, coercively informed a job applicant that he could not hire union members.

About June 17, 2004, the Respondent, by its supervisor and agent, Richard Cola, at a Sam's Club worksite in Mentor, Ohio, unlawfully interrogated a job applicant as to whether he was a union member.

About July 2004, the exact date being unknown, the Respondent failed and refused to consider for hire or to hire job applicants Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann for employment. The Respondent failed and refused to consider for hire or to hire the eight job applicants because they joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

About July 20, 2004, the exact date being unknown, the Respondent discharged employee Richard Ferl. The Respondent discharged Ferl because he joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. In addition, by failing and refusing to consider for hire or hire job applicants Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann, and by discharging Richard Ferl, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to consider for hire or hire job applicants Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann, we shall order the Respondent to expunge from its files any and all references to these unlawful refusals, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.[4]

In addition, having found that the Respondent violated Section 8(a)(3) and (1) by discharging Richard Ferl, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth* Co., 90 NLRB 289 (1950),

[4] As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy.

with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be required to remove from its files all references to the unlawful discharge of Richard Ferl, and to notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Cola Electric Company, Inc., Mentor, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees or job applicants about their union membership, activities, or sympathies.

(b) Stating or implying that job applicants who have union affiliations or who intend to organize the Respondent's employees will not be hired.

(c) Refusing to consider for hire or to hire job applicants because they joined or assisted a union or engaged in concerted activities, or to discourage employees from engaging in these activities.

(d) Discharging or otherwise discriminating against employees because they joined or assisted a union or engaged in concerted activities, or to discourage employees from engaging in these activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful refusals to consider for hire or to hire Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann, and within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

(b) Within 14 days from the date of this Order, offer Richard Ferl full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(c) Make Richard Ferl whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this Decision.

(d) Within 14 days from the date of this Order, remove from its files all references to the unlawful termination of Richard Ferl, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Mentor, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of how many job openings were available, at times relevant, for Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees and/or job applicants about their union membership, activities, or sympathies.

WE WILL NOT state or imply that job applicants who have union affiliations or who intend to organize our employees will not be hired.

WE WILL NOT fail or refuse to consider for hire or to hire job applicants because they join or assist a union or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT discharge or otherwise discriminate against you because you join or assist a union or engage in concerted activities, or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful refusal to consider for hire or to hire Daniel J. Ziemak, Kenneth Sutterfield, Michael Kubaki, Mathew Fleming, Steve Herczeg, James Novak, Daniel George, and Lindey McCann, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Ferl full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Richard Ferl whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful termination of Richard Ferl, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that our unlawful conduct will not be used against him in any way.

COLA ELECTRIC COMPANY, INC.